[redacted]ILE COPY

Office Supreme Court, U.S.
FILED
OCT 20 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 435

DART DRUG CORPORATION OF MARYLAND, AND PEOPLES SERVICE DRUG STORES, INC.,
Appellants,

v.

ELLIS GADOL AND SELMA GADOL, CO-PARTNERS DOING BUSINESS AS FOUR CORNERS PHARMACY,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

JOSEPH S. KAUFMAN,
111 N. Charles Street,
Baltimore 1, Maryland,
Attorney for Appellees.

Of Counsel:

BERNARD S. MELNICOVE,
111 N. Charles Street,
Baltimore 1, Maryland,

STEDMAN PRESCOTT, JR.,
Guardian Federal Building,
Silver Spring, Md.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
Motion to Dismiss or Affirm	1
Statement	2
Argument:	
I. The Federal question sought to be reviewed was not properly raised below or expressly passed upon by the Court of Appeals of Maryland	2
II. This case is not within the appeal jurisdiction of this Court	5
III. This appeal does not present the question sought to be reviewed or any substantial Federal question and it is manifest that the questions on which the decision of this case depend are so unsubstantial as not to need further argument	7
(a) The questions sought to be reviewed are not involved in this case	7
(b) There is no substantial Federal question in this case	9
Conclusion	10

Table of Citations

Cases

Bailey v. Anderson, 326 U.S. 203	5
Cons. Turnpike Co. v. O.V.R. Co., 228 U.S. 326	5
Vestry of Emmanuel Church of Balto. v. Safe Deposit & Tr. Co., 169 Md. 28, 179 A. 64	4
Erie Co. v. Purdy, 185 U.S. 148	5
Forbes v. State Council, 216 U.S. 396	5

	PAGE
Globe Slicing Mach. Co. v. Murphy, 161 Md. 667, 158 A. 26	4
Goldsmith v. Mead Johnson, 176 Md. 682	6
Holler v. Lowery, 175 Md. 149, 200 A. 353	4
Home Utilities Co. v. Revere, 209 Md. 610	6
Hutzler Co. v. Remington Putnam Book Co., 186 Md. 210	7
Ill. Cent. R. Co. v. Ky., 218 U.S. 551	5
John v. Paullin, 231 U.S. 583	4
May Co. v. Drury, 160 Md. 143, 153 A. 61	4
McCorquodale v. Texas, 211 U.S. 432	5
Mutual Life Ins. Co. v. McGrew, 188 U.S. 291	5
Pa. R. Co. v. Ill. Brick Co., 297 U.S. 447	5
Prudential Ins. Co. v. Benjamin, 328 U.S. 408	6
Schill v. Remington Putnam Book Co., 179 Md. 83	7
Schneider v. Davis, 194 Md. 316, 71 A. 2d 32	4
Schroepfer v. A. S. Abell Co., 4th C.C.A., 138 F. 2d 111, cert. den. 321 U.S. 763, rehearing den. 322 U.S. 770	4
State v. United Rwys. & Elec. Co., 162 Md. 404, 159 A. 916	4
Stembridge v. Ga., 343 U.S. 541	5
Tawes v. Aerial Products, Inc., 210 Md. 627, 124 A. 2d 805	4
Winters v. New York, 333 U.S. 507	6
Wolfe v. State, use of Brown, 173 Md. 103, 194 A. 832	4

Statutes

Annotated Code of Maryland (1957 Ed.):	
Article 83 —	
Secs. 102-110	2
Sec. 107	7
15 U.S.C. — Sec. 45 (McGuire Act)	8
28 U.S.C. — Sec. 1257(2)	5

Miscellaneous

	PAGE
Callman, *Unfair Competition & Trade Marks*, 2nd Ed., Vol. I, Sec. 24.3	7
2 Md. Law Encyclopedia, *Appeal & Error*, 402, pp. 312-13	4
Maryland Rules of Procedure:	
Rule 831 (Formerly Rule 39)	4
Supreme Court Rules — Revised:	
Rule 16	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 435

DART DRUG CORPORATION OF MARYLAND, AND PEOPLES SERVICE DRUG STORES, INC.,
Appellants,

v.

ELLIS GADOL AND SELMA GADOL, CO-PARTNERS DOING BUSINESS AS FOUR CORNERS PHARMACY,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss or affirm on the following grounds:

(a) The Federal question sought to be reviewed was not properly raised before or expressly passed upon by the Court of Appeals of Maryland;

(b) This appeal is not within the jurisdiction of this Court because it has not been taken in conformity with statute;

(c) This appeal does not present the question sought to be reviewed or any substantial Federal question.

STATEMENT

This is an appeal from a decision of the Court of Appeals of Maryland reversing an Order of the Circuit Court for Montgomery County and remanding the cause for further proceedings and the entry of a decree permanently enjoining the Appellants from advertising, offering for sale and selling the products of certain manufacturers at below the Fair Trade prices established by those manufacturers (222 Md. 372, 161 A. 2d 122). The case arose by the filing of a Bill of Complaint by Appellees to enjoin two chain drug stores in direct competition with Appellees from advertising and selling products of the named manufacturers at less than the minimum retail resale prices fixed and established by those manufacturers under the Maryland Fair Trade Act (Article 83, Sections 102-110 of the Annotated Code of Maryland, 1957 Ed.). An Interlocutory Injunction was issued on July 28, 1958 and thereafter on November 12, 1959 an Order was passed dissolving the Interlocutory Injunction and dismissing the Bill and, therefore, denying a permanent injunction. An appeal from the Order of the Circuit Court for Montgomery County was taken to the Court of Appeals of Maryland, which reversed the decision of the lower Court.

ARGUMENT

I.

The Federal Question Sought To Be Reviewed Was Not Properly Raised Below or Expressly Passed Upon By the Court of Appeals of Maryland.

The Appellants did not raise in their briefs or in oral argument in the Court of Appeals of Maryland the issues now sought to be raised by their Jurisdictional Statement. The opinion of the Court of Appeals clearly shows that the questions now presented to this Court were not before that

Court and therefore, not considered by it (Jurisdictional Statement, Appendix A, p. 2a).

The Appellants in their Jurisdictional Statement (p. 3), state that they admitted advertising and selling the products in question at prices below the retail resale prices set by the manufacturers but defended on two questions:

1. That the manufacturers had failed diligently to enforce contracts under the statute; and

2. The Plaintiff as a retailer in competition with the Appellants had no right to enjoin the alleged price cutting.

The lower Court and the Court of Appeals found that the question involved was whether reasonable diligence on the part of manufacturers to enforce Fair Trade adherence to their prices had been shown. No question was raised as to whether the Appellees as competing retailers had the right to seek an injunction against the Appellants.

In fact, the Appellant, Dart Drug Corporation of Maryland, in its brief in the Court of Appeals of Maryland opened its argument with the following statement (see Brief of Dart Drug Corporation of Maryland in the Court of Appeals of Maryland, p. 9).

> "The appellee Dart does not agree that the questions in this appeal are stated by the appellants. *Neither Peoples nor Dart has ever questioned the right of a retailer who is injured by a violation of the Maryland Fair Trade Act to seek an injunction.* Furthermore, the lower court referred to the authority of the Appellants to bring this suit by stating that they brought the suit under that part of Section 107 of Article 83 of the Code which states that violations are 'actionable at the suit of any person damaged thereby'." (Emphasis supplied.)

After the decision of the Court of Appeals the Appellants filed motions for reargument referring to the language of the Court's opinion and stating, "In view of the action of the Court of Appeals directing a permanent injunction be issued, it is submitted that this matter of damages should be presented to the Court." (Appellant, Dart Drug Corporation of Maryland, Motion for Reargument, paragraph 4.) That on June 29, 1960, the Court of Appeals passed an Order denying the Motion for Reargument.

Upon the aforegoing facts, it is beyond doubt that the question sought to be reviewed is not now before this Court. The Maryland Court of Appeals like most other appellate courts, has consistently and uniformly held that any contentions not briefed in that Court may be deemed abandoned and need not be considered by the Court of Appeals.[1]

As was said in *John v. Paullin*, 231 U.S. 583, 585:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appeal courts, and the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

---

[1] *Vestry of Emmanuel Church of Balto. v. Safe Dep. & Tr. Co.*, 169 Md. 28, 37, 179 A. 64; *Tawes v. Aerial Products, Inc.*, 210 Md. 627, 644, 124 A. 2d 805; *Schneider v. Davis*, 194 Md. 316, 71 A. 2d 32; *Holler v. Lowery*, 175 Md. 149, 200 A. 353; *Wolfe v. State, use of Brown*, 173 Md. 103, 194 A. 832; *State v. United Rwys. & Elec. Co.*, 162 Md. 404, 159 A. 916; *Globe Slicing Mach. Co. v. Murphy*, 161 Md. 667, 158 A. 26; *May Co. v. Drury*, 160 Md. 143, 153 A. 61. See also Md. Rules of Procedure, Rule 831, formerly 39 of the Rules and Regulations respecting Appeals to the Court of Appeals of Maryland; *Schroepfer v. A. S. Abell Co.*, 4th C.C.A. 138 F. 2d 111, cert. den. 321 U.S. 763, rehearing den. 322 U.S. 770; 2 Maryland Law Encyclopedia, Appeal and Error, 402, pp. 312-13.

It is well and specifically established that the Court of Appeals' denial, without comment, of appellants' motion for reargument, which attempted to raise a federal question not theretofore before the Court of Appeals, does not constitute a basis for review in this Court, it being presumed that the ruling on the motion was based on State procedural grounds, precluding Supreme Court review.[2]

The instant case affords even less basis for jurisdiction than the cases herein cited since the opinion of the Court of Appeals makes clear that the question now sought to be raised was not before it, and the brief of the Appellant, Dart, expressly stated that, "*. . .* Neither Peoples nor Dart has ever questioned the right of a retailer who is injured by a violation of the Maryland Fair Trade Act to seek an injunction." It is clear that there is nothing for this Court to review.

II.

This Case Is Not Within the Appeal Jurisdiction of This Court.

The Appellants herein rely upon the provisions of Title 28, U.S.C. Section 1257(2) and now seek to claim that the

---

[2] *Cons. Turnpike Co. v. O.V.R. Co.*, 228 U.S. 326, 333-4; *Forbes v. State Council*, 216 U.S. 396, 399; *McCorquodale v. Texas*, 211 U.S. 432, 436-7. Cf. *Ill. Cent. R. Co. v. Ky.*, 218 U.S. 554; *Pa. R. Co. v. Ill. Brick Co.*, 297 U.S. 447, 462-3; *Erie Co. v. Purdy*, 185 U.S. 148; *Mut. Life Ins. Co. v. McGrew*, 188 U.S. 291, 309. See also, *Bailey v. Anderson*, 326 U.S. 203, 206-7 (Supreme Court assumes where procedural deficiency exists in raising and preserving federal questions in State courts that State court silence on the federal question, unless it can be shown otherwise, is due to procedural deficiency, thus precluding Supreme Court review); *Stembridge v. Ga.*, 343 U.S. 541, 547-8 (where federal question raised for first time in petition for rehearing in intermediate appellate court, highest State court's refusal without opinion to hear case precludes Supreme Court review since Supreme Court is without jurisdiction "when the question of the existence of an adequate State ground is debatable and action of highest State court might have been based on adequate State procedural ground).

appeal involves the constitutionality of the "non-signer clause" of the Maryland Fair Trade Act, supra. The constitutionality or validity of the Maryland Fair Trade Act was neither raised in the proceedings presented to the lower court for decision or presented and ruled upon by the Court of Appeals of Maryland. In the cases cited by the Appellants in the Jurisdictional Statement (p. 2)[3] there was a direct finding upholding the constitutionality and validity of state laws involved by State Courts. In this case no question was raised at any stage of the proceedings. In fact, said question of constitutionality has been sustained by the Maryland Court of Appeals on several prior occasions. See *Goldsmith v. Mead Johnson*, 176 Md. 682 and *Home Utilities Co. v. Revere*, 209 Md. 610.

Before the Circuit Court for Montgomery County the sole defense made was that the manufacturers "have failed to make reasonably diligent efforts to enforce their fair trade contracts and therefor such prices have been abandoned." (Jurisdictional State, Appendix p. 13a). In the Court of Appeals of Maryland there was presented the mixed question of fact and law as to whether reasonable diligence had been shown by the manufacturers involved (See Jurisdictional Statement, Appendix p. 2a). Appellants did not claim at any stage of the proceedings that the enforcement of Fair Trade Contracts by competing retailers would make the Maryland Fair Trade Law void under Federal Law.

---

[3] *Winters v. New York*, 333 U.S. 507; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408.

III.

This Appeal Does Not Present the Question Sought To Be Reviewed or Any Substantial Federal Question and It Is Manifest That the Questions On Which the Decision of This Case Depend Are So Unsubstantial As Not To Need Further Argument.

(a)

THE QUESTIONS SOUGHT TO BE REVIEWED ARE NOT INVOLVED IN THIS CASE.

The elements in the Appellants' claim of Federal rights are that the Appellees being competing retailers are not persons damaged by the admitted predatory price cutting by the Appellants. The Court of Appeals of Maryland in two earlier Fair Trade cases recognized and sanctioned the right of a retailer to bring an action against a competing retailer who was selling fair traded items below the established Fair Trade prices. *Schill v. Remington Putnam Book Co.*, 179 Md. 83 and *Hutzler Co. v. Remington Putnam Book Co.*, 186 Md. 210. The Fair Trade Act itself recognizes the right of a retailer to bring action. Article 83, Section 107 of the Annotated Code of Maryland (1957 Ed.) expressly provides that willfully and knowingly advertising, offering for sale and selling any commodity at less than the prices established in any contract entered into pursuant to the Fair Trade Law is "unfair competition and is actionable upon the suit of any person damaged thereby".[4]

---

[4] The rationale for allowing a competing retailer who himself abides by the Fair Trade Contract to bring suit is more succinctly set forth in Callmann, *Unfair Competition and Trade Marks*, Second Edition, Vol. I, Sec. 24.3 as follows: "The gist, however, of the case is not trespass upon property or breach of contract, but unfair competition; and the real plaintiff is not the owner of the good will or the party to a contract, but the competitor of the price-cutting dealer. While under the common law of unfair competition, the competitor is en-

Nowhere in these proceedings was it ever contended that a competing retailer did not have the right to bring this action as being one of those persons damaged by the unfair competition of the Appellants. Likewise, nowhere was there mentioned that this action in any way conflicted with the Anti-Trust Laws of the United States or that the action was in violation of the provisions of the McGuire Act (15 U.S.C. 45).[5]

The Appellants have the audacity to state the proposition that as the statute was construed below, the Legisla-

---

titled to sue only as the owner of property interests, the Fair Trade Acts declare the unfair competition of price-cutting actionable at the suit of 'any person damaged thereby.' Herein lies the importance of the Fair Trade Acts, the statutory language of which speaks of unfair competition. 'The one who to a greater degree bears the brunt or burden as a consequence of price-cutting by a retailer is the competing retailer who is observing his contract obligations. Such a retailer suffers proportionately to a greater extent than does the producer. After all, even the price-cutter must directly or indirectly get his goods to sell on the price-cutting basis from the producer, while the retailer who observes his contract obligation is deprived of his sales and his good repute in the neighborhood and is damaged as a consequence of the price-cutting acts of his competitors'. The retailer, distributor, wholesaler or jobber, is entitled to sue not because he has an interest in the good will — not because he has gone to great expense in advertising the trade mark — but merely because he, as a competitor, is likely to suffer damage from the price-cutting, and there can be no doubt that he is a 'person damaged' within the meaning of the Fair Trade Act."

[5] It is expressly provided in the McGuire Act, 15 U.S.C., Section 45, that enforcement of Fair Trade Contracts do not conflict with the provisions of the Federal Trade Commission Acts or the Anti-Trust Acts and sub-section 3 thereof provides as follows: "Nothing contained in this Act or in any of the Anti-trust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, *is unfair competition and is actionable at the suit of any person damaged thereby.*" (Emphasis supplied.)

ture has delegated the power to fix prices to a competing retailer (Jurisdictional Statement, p. 11). The record in this case clearly shows that the Fair Trade prices were fixed by the manufacturers in accordance with the Fair Trade Act. There is no evidence whatsoever that competing retailers established prices. In fact, to the contrary, the uncontradicted testimony shows that the manufacturers had determined the prices to be charged on the trademarked items (Record Extract, p. 161).

(b)

THERE IS NO SUBSTANTIAL FEDERAL QUESTION IN THIS CASE.

Even if this appeal presented the question sought to be reviewed, the question is not substantial. The question as presented does not contend that the decision of the Court of Appeals of Maryland denied the Appellants due process or equal protection of laws. The issues were clearly defined and fully tried, and the question of reasonable diligence was applied in accordance with State law. The Appellants are obviously claiming special exemption from the Maryland Fair Trade Act, so that they can continue to engender unfair competition between themselves and the Appellees. It is perfectly clear that the Appellants seek a special license to violate a law which others are fully complying with and bound by. The facts of this case clearly show unfair competition by the Appellants, the prevention of which has traditionally been handled by the State Courts.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this appeal be dismissed or the decision of the Court of Appeals of Maryland be affirmed and the mandate issue forthwith.

Respectfully submitted,

JOSEPH S. KAUFMAN,
Attorney for Appellees.

Of Counsel:

BERNARD S. MELNICOVE,
STEDMAN PRESCOTT, JR.,